

ORIGINAL

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Implementation of the)
 Telecommunications Act of 1996:)
)
 Telecommunications Carriers' Use)
 of Customer Proprietary Network)
 Information and Other Customer Information)

CC Docket No. 96-115

**ARCH COMMUNICATIONS GROUP, INC. COMMENTS IN SUPPORT OF
 CMRS PETITIONS FOR RECONSIDERATION AND/OR FORBEARANCE**

Arch Communications, Inc. ("Arch"), which provides paging and other messaging services, submits these comments in support of the petitions for reconsideration and/or forbearance filed by providers of commercial mobile radio services ("CMRS") and their trade associations.¹

The fundamental error of the *CPNI Order*² is the use of a "one-size-fits-all" approach in the implementation of Section 222 of the Communications Act. The *CPNI Order* applies the same set of detailed, *Computer III*-type rules designed for application to monopolists

¹ Petitions have been filed by: Cellular Telecommunications Industry Association ("CTIA"); Comcast Cellular Communications, Inc. ("Comcast"); CommNet Cellular, Inc. ("CommNet"); Metrocall, Inc. ("Metrocall"); Omnipoint Communications, Inc. ("Omnipoint"); Paging Network, Inc. ("PageNet"); Personal Communications Industry Association ("PCIA"); PrimeCo Personal Communications, L.P. ("PrimeCo"); RAM Technologies, Inc. ("RAM"); 360 Communications Company ("360"); Vanguard Cellular Systems, Inc. ("Vanguard").

² *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rule Making, 63 Fed. Reg. 20326 (Apr. 24, 1998) ("*CPNI Order*").

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to carriers like Arch which operate in “extremely competitive” markets.³ This broad brush approach to CPNI is counterproductive and upsets the very balance Congress sought to achieve in the Telecommunications Act of 1996 generally and in Section 222 in particular.

Section 222 in many respects is susceptible to varying interpretations. In drafting rules implementing Section 222's provisions, however, the Commission in almost every instance has adopted the interpretation that results in more rather than less regulation. For example, the Commission concluded that inside wiring is subject to the CPNI exception set forth in Section 222 (c)(1), but that CPE does not. Similarly, the Commission found that information services are not “necessary to or used in” the provision of the underlying telecommunications service even though Congress indicated that the publishing of directories did meet this definition.

As the Commission has noted, “Congress has delineated its preference for allowing [the CMRS] market to develop subject to *only as much regulation for which the Commission and the states could demonstrate a clear cut need*”:⁴

[W]e consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon [CMRS] carriers because consumers and the national economy benefit from such a course.⁵

³ See *Implementation of Section 6002(b) of the Omnibus Budget Act of 1993: Annual Report and Analysis of the Competitive Market Conditions With Respect to Commercial Mobile Services*, Third Report, FCC 98-91 (rel. June 11, 1998), Separate Statement of Chairman William E. Kennard (“*Third CMRS Report*”).

⁴ *Connecticut Department of Public Utility*, 10 FCC Rcd 7025, 7031 ¶ 10 (1995)(emphasis added).

⁵ *Implementation of Section 6002(b) of the Omnibus Budget Act of 1993: Annual Report and Analysis of the Competitive Market Conditions With Respect to Commercial Mobile Services*, Second Report, 9 FCC Rcd 1411, 1419 ¶ 17 (1994) (“*Second CMRS Report*”).

Record evidence does not demonstrate any need, certainly not “a clear cut need,” justifying imposition of detailed new CPNI regulations on the CMRS industry. Competitive market forces ensure that customer privacy interests will be fully protected — as evidenced by the absence in the past of customer complaints even alleging CMRS provider violations of privacy interests. To the contrary, it is application of the new CPNI rules that would harm customers because the rules will subvert the ability of carriers to meet customer expectations, impede the ability of carriers to treat their customers as individuals (by recommending packages which each customer may find uniquely attractive), and needlessly increase carrier costs — costs that invariably will be passed through to customers.

Arch therefore urges the Commission to reconsider the rules discussed below because they are based on interpretations which are not mandated by Section 222's statutory language. In those instances where the Commission feels constrained by the statutory language, Arch endorses the views of those parties requesting forbearance.

I. THE COMMISSION SHOULD RECONSIDER SOME OF ITS NEW CPNI RULES

As noted above, in situations where the statute is open to differing interpretations, the Commission has generally adopted the view that results in more intrusive regulation. Arch supports those parties urging the Commission to reconsider those findings.

A. Section 222 Permits Carriers to Use CPNI in Selling CMRS CPE and Information Services

Section 222(c)(1) expressly authorizes carriers to use CPNI, without prior customer approval, in the provision of “services necessary to, or used in, the provision of [a]

telecommunications service, including the publication of directories.”⁶ Although pagers and other CMRS handsets are a necessary component of CMRS, certainly more so than the publication of directories, the Commission held that the provision of CPE was not a “service” within the ambit of Section 222(c)(1).⁷ But as CTIA and others point out, CPE is an indispensable component of a Title III radio service.⁸

The Commission similarly concluded that voice mail and other information services are “not necessary to, or used in, the provision of” any telecommunications service.”⁹ However, the petitions conclusively demonstrate that, whatever may be the case with regard to landline markets, this conclusion is not grounded in fact with respect to the CMRS market.¹⁰ Indeed, as noted above, the Commission recently noted that market demand in the messaging market has compelled paging carriers to offer voice messaging and other innovative information services, and customers use these new services as an important component of their overall mobility needs. The Commission should, therefore, reconsider Rule 64.2005(b)(1).

B. Section 222 Permits Carriers to Use CPNI in Attempting to Win Back a Customer

The Commission has prohibited carriers from using CPNI for customer retention purposes, concluding that use of CPNI is “outside of the customer’s existing service relation-

⁶ 47 U.S.C. § 222(c)(1)(B).

⁷ *CPNI Order* at ¶ 71.

⁸ CTIA Petition at 18-19; PrimeCo Petition at 6.

⁹ *CPNI Order* at ¶ 72.

¹⁰ *See, e.g.*, CTIA Petition at 28-29; PageNet Petition at 5-6; PCIA Petition at 12-13; PrimeCo Petition at 6-8.

ship” and is “not statutorily permitted.”¹¹ However, there is nothing in the statute that compels such an interpretation. Indeed, the petitions demonstrate that the Commission’s factual conclusion and its legal conclusion are erroneous.¹² In fact, the new “anti win back” rule suppresses competition to the detriment of customers. As PCIA has observed:

[C]arriers’ attempts to win back former customers create one of the most direct and pro-consumer forms of price competition imaginable. This competition arises because a former customer knows exactly what his or her new service provider is charges for service and what the former provider previously charged. Armed with this information, the consumer can negotiate more favorable rates by playing the carriers off against one another.¹³

In the end, use of CPNI as part of a customer retention program does not implicate any privacy interests. Arch’s experience is similar to that of other carriers: “customers not only have come to expect their service provider to use their CPNI for retention calls, they have come to rely on such calls to negotiate more competitive service arrangements.”¹⁴ The Commission should, therefore, reconsider Rule 64.2005(b)(3).

C. Record Evidence Does Not Support Extension of Mandatory Computerized Safeguards to Competitive Carriers

The Commission has required all carriers to “implement software systems that ‘flag’ customer service records in connection with CPNI” and to “maintain an electronic audit

¹¹ *CPNI Order* at ¶ 85.

¹² *See, e.g.*, CTIA Petition at 31-33; Comcast Petition at 16-18; Omnipoint Petition at 17-19; PageNet Petition at 2-4; PCIA at 9-11; PrimeCo Petition at 9-10; 360° Petition at 10-11; Vanguard Petition at 13-15.

¹³ PCIA Petition at 10.

¹⁴ 360° Petition at 10.

mechanism that tracks access to customer accounts.”¹⁵ Based upon a handful of *ex partes* submitted by very large carriers which have considerable experience with computerized CPNI safeguards,¹⁶ the Commission concluded that these computer modifications would “not [be] unduly burdensome” because they can be implemented “relatively easily.”¹⁷

The petitions establish conclusively that the Commission’s conclusions are contrary to fact and that the new computerized requirements are not warranted. Indeed, even the dominant carriers upon which the Commission cited for its conclusions have pointed out in their reconsideration petitions that even for them, the new computer compliance requirements can neither be implemented easily nor deployed at minimal cost.¹⁸ The problem faced by carriers like Arch which have never been subject to any CPNI rules and which have no computerized safeguard experience is even more daunting. As LCI correctly notes:

AT&T’s and the BOCs’ abilities provide no insight into the burdens on . . . competitive carriers to implement what are to them entirely new systems. Indeed, given the historical regulation under which those carriers operated, it seems entirely unlikely that competitive carriers — who have generally been subjects of deregulation by the Commission — would have systems in place that mirror those developed by AT&T or the BOCs.¹⁹

¹⁵ CPNI Order at ¶¶ 198-99.

¹⁶ CPNI Order at notes 689 and 692.

¹⁷ CPNI Order at ¶¶ 194 and 198.

¹⁸ See, e.g., AT&T Petition at 8-17; Bell Atlantic Petition at 22-23; Sprint Petition at 2-6.

¹⁹ LCI Petition at 5.

Moreover, as other petitioners point out, the enormous costs to implement these new requirements far exceed any of their anticipated benefits.²⁰

Competitive carriers like Arch have historically relied on employee training to comply with the Commission's rules. As the Commission itself has acknowledged, personnel training can be an effective compliance procedure and has the additional advantage of "promot[ing] customer convenience and permit[ing] carriers to operate more efficiently with less regulatory interference."²¹ The Commission should, therefore, extend to competitive carriers the same flexibility contained in Section 222 itself: the ability to implement CPNI safeguards in a manner that is most efficient.

II. ALTERNATIVELY, THE COMMISSION SHOULD FORBEAR FROM APPLYING SOME OF THE NEW CPNI RULES TO PAGING/MESSAGING CARRIERS

Arch supports those petitions requesting the Commission to forbear from applying its new CPNI rules to CMRS providers.²² As these petitions demonstrate, the Communications Act *requires* forbearance for a "class of telecommunications carriers" when Commission rules are "not necessary for the protection of consumers" and when "forbearance will promote competition among providers of telecommunications services."²³

²⁰ See, e.g., AT&T Petition at 11-16; BellSouth Petition at 22-23.

²¹ CPNI Order at ¶ 197.

²² See, e.g., CTIA Petition at 34-42; CommNet Petition at 4-9; PrimeCo Petition at 11-16; 3600 Petition at 3-6. Like these petitioners, Arch does not seek forbearance from Section 222 itself because the statute contains important customer protections, including the right to require one carrier to share CPNI with its competitor under certain circumstances and the prohibition on selling CPNI to others. Arch rather seeks forbearance from application of rules designed for markets with dominant carriers possessing market power.

²³ 47 U.S.C. §§ 160(a), (b) and (c).

The new CPNI rules are not necessary to protect the privacy interests of paging customers. The paging/messaging market, the Commission has observed, “has long been a highly competitive business” that is “now facing potential additional competition from providers of other services, such as mobile telephone, mobile data and even satellite providers.”²⁴ Because of the many choices available to customers, the relationship between a customer and its serving paging carrier is a *voluntary* relationship.²⁵ In addition, because of the intense competition, paging carriers have every incentive to respect the privacy interests of their customers. As 3600 notes correctly:

To the extent that customers may disapprove of a carrier’s use of CPNI to market CMRS services, those customers will change carriers. Thus, if a carrier is to maintain its customer base, it must not abuse or improperly use CPNI. The new CPNI rules, therefore, are unnecessary to prevent unreasonable or unjust carrier behavior.²⁶

CMRS providers thus have a strong incentive to respect the privacy rights and interests of its customers -- if only to avoid the sizable cost of acquiring a replacement customer.

Moreover, forbearance will promote competition, increase customer choices, and lower prices. As the Commission noted recently, market demands have compelled paging carriers to expand their product offerings to include “two-way messaging and acknowledgment, voice messaging, and data transmissions such as e-mail and stock quotes” and to “increase[] use

²⁴ *Third CMRS Report* at 63-64.

²⁵ *See PrimeCo Petition* at 13.

²⁶ 3600 *Petition* at 5.

of ‘bundles’ (i.e., multiple services from the same device) as a marketing tool.”²⁷ Yet, having expanded their product offerings to meet customer demand, CMRS providers are now told that, in the name of protecting customers, they cannot market their new services in a way that is most efficient and in a way that customers have come to expect.

The central issue raised by the new CPNI rules is that they prevent each competitive CMRS carrier from treating each of its customers as a unique individual. As PrimeCo has noted:

[C]ustomers expect their CMRS provider will advise them of specific service offerings that will be useful to *them* — *not* offerings which the carrier should know a customer would have little interest.²⁸

This observation is particularly applicable to a company like Arch where the vast majority of its customers are business rather than residential users. These customers have come to rely upon Arch to serve as a consultant and provide telecommunications guidance and assistance as their businesses grow. These clients expect Arch to keep them apprised of any new product offerings that might be beneficial to their operations. Without full access to each customer’s CPNI, however, Arch and other CMRS providers cannot treat their customers as individuals by recommending specific service packages which they should find attractive.

²⁷ *Third CMRS Report* at 4 and 5.

²⁸ PrimeCo Petition at 3 (emphasis in original).

III. CONCLUSION

The Commission advised Congress earlier this month it "does not wish to impose regulations that will slow the emergence of new, innovative technologies" and that "[c]hanges in the regulation of CMRS providers can have an effect on competition in the market."²⁸ The application of the new CPNI rules to the CMRS industry will adversely effect competition in the CMRS market and will slow public use of new, innovative technologies. The Commission should, therefore, reconsider or forbear from applying these new rules as applied to CMRS providers generally and paging carriers in particular.

Respectfully submitted,

ARCH COMMUNICATIONS GROUP, INC.

By: 

Paul H. Kuzia

Executive Vice President

Technology and Regulatory Affairs

Arch Communications Group, Inc.
1800 West Park Drive, Suite 250
Westborough, MA 01581-3912
508-879-6600

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²⁹ *Third CMRS Report at 5 and 6.*

CERTIFICATE OF SERVICE

I, Joy M. Taylor, hereby certify that I have on this 26th day of June, 1998 caused a copy of the foregoing Comments of Arch Communications Group, Inc. to be served by first class U.S. mail, postage prepaid, to the following:

The Honorable William E. Kennard*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

The Honorable Harold Furchtgott-Roth*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Michael Powell*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Gloria Tristani*
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Daniel Phythyon, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Rosalind K. Allen*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Jeanine Poltronieri*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

A. Richard Metzger, Jr.*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 712
Washington, D.C. 20554

Janice M. Myles*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Michael F. Altschul
Randall S. Coleman
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

R. Michael Senkowski
Michael Yourshaw
Gregory J. Vogt
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Leon M. Kestenbaum
Jay C. Keithley
Michael B. Fingerhut
Attorneys for Sprint Corporation
1850 M Street, N.W. 11th Floor
Washington, DC 20036

Robert Hoggarth
Senior Vice President, Paging and
Messaging
Personal Communications Industry
Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314

Mark C. Rosenblum
Judy Sello
AT&T Corp.
Room 3245I1
295 North Maple Avenue
Basking Ridge, NJ 07920

William L. Roughton, Jr.
Associate General Counsel
PrimeCo Personal Communications, L.P.
601 13th Street, N.W. Suite 320 South
Washington, DC 20005

M. Robert Sutherland
A. Kirven Gilvert III
BellSouth Corporation
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309

Judith St. Ledger-Roty
Counsel for PageNet
Kelley Drye & Warren LLP
1200 19th Street, N.W. Suite 500
Washington, DC 20036

Douglas W. Kinkpoh
J. Scott Nicholls
LCI International Telecom Corp.
8180 Greensboro Dr., Suite 800
McLean, VA 22102

Kawrence W. Katz
Attorney for the Bell Atlantic Companies
1320 N. Court House Rd.
8th Floor
Arlington, VA 22201

*By Hand

Benjamin H. Dickens, Jr.
Gerard J. Duffy
Susan J. Bahr
Attorneys for CommNet Cellular, Inc.
Blooston, Mordkofsky, Jackson & Dickens
Suite 300, 2120 L Street, NW
Washington, DC 20037

Vanguard Cellular Systems, Inc.
2002 Pisgah Church Road, Suite 300
Greensboro, NC 27455-3314

360° Communications Company
8725 West Higgins Road
Chicago, IL 60631

RAM Mobile Data
1133 Connecticut Avenue, N.W.
Washington, DC 20036-4305

Richard M. Joyce
Counsel for MetroCall
Joyce & Jacobs
1019 19th Street, N.W., 14th Floor
Washington, DC 20036

Raymond G. Bender, Jr.
J.G. Harrington
Kelli Jareaux
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

International Transcription Services*
1231 20th Street, N.W.
Washington, D.C. 20036


Joy M. Taylor